

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.319 OF 1987**

Rajaram Vithu Shinde
(since deceased by heirs and L.Rs.)

1. Dnyandeo Rajaram Shinde

2. Nathuram Rajaram Shinde

...Appellants

Vs.

(1) Bhagirathibai Kesu Jadhav

(since deceased through heirs)

(A) Keshav Sayaji Jadhav

(B) Ravji Keshav Jadhav

(C) Ankush Keshav Jadhav

(D) Baban Keshav Jadhav

(E) Jaysing Keshav Jadhav

(F) Popat Keshav Jadhav

(G) Mahipati Keshav Jadhav

(2) Indubai Ankush Nipane

(3) Chandrakant Gangaram Nipane

(4) Kamal Govindrao Pawar

(5) Gangaram Laxman Nipane

...Respondents

Mr.V.A.Thorat, Senior Advocate for the Appellants

Mr.B.G.Vaidya for the Respondent Nos.1(B) to 1(Q), 2 to 5.

CORAM: A.S.OKA, J.

DATED: JANUARY 14, 2005.

ORAL JUDGMENT:

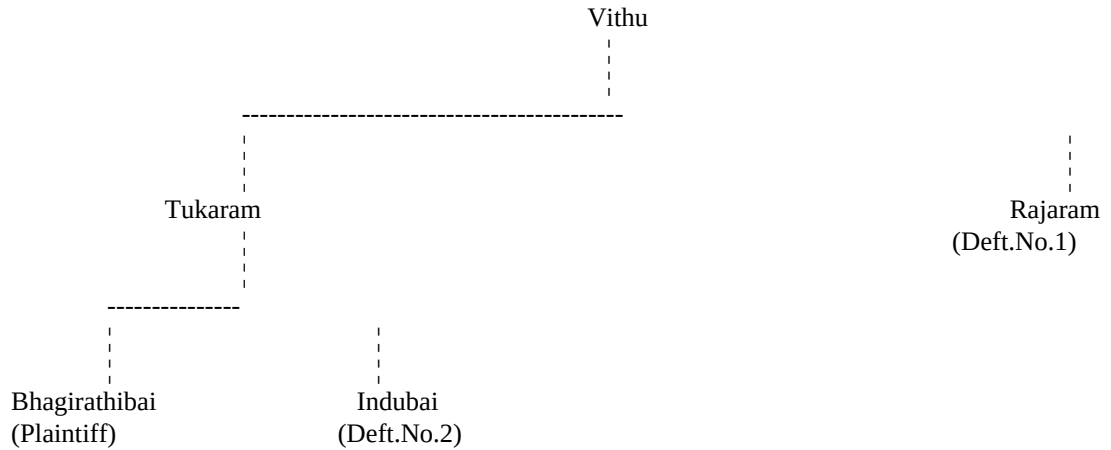
1. Heard Counsel appearing for the Appellants. While

admitting this Appeal this Court framed the following

substantial question of law :

"Having held that the burden of proving that Tukaram died in 1955 (before the advent of the Hindu Succession Act), lay on the deceased Plaintiff and further holding that the decree adduced by her on this issue was unconvincing and unsatisfactory, is the finding of the District Court in her favour before that Tukaram died before the advent of the aforesaid Act."

2. The Appellant is the unsuccessful Defendant No.1. The Respondent No.1 is the original Plaintiff. The genealogy showing the relationship between the parties is as under :



3. The Respondent No.1 Bhagirathibai came to the Court with a case that her father Tukaram died in or about 1960 i.e. after coming into force of Hindu Succession Act, 1956. She therefore claimed partition and separate possession of her share in the suit property which includes the land and house property.

4. The suit was resisted by the Appellant by contending that Tukaram expired in the year 1955 and not in the year 1960. In view of this position, the Appellant contended that the Appellant being the daughter of deceased Tukaram, will not be entitled to file a suit for partition and claim any share.

5. The Trial Court framed issues. Issue No.1 read thus :

. "Does the Defendant No.1 prove that Tukaram died in the

year 1955?"

The Trial Court answered the issue against the Appellants. The Trial Court therefore proceeded to pass the decree for partition and separate possession in respect of the suit property excluding the house property. In an Appeal preferred by the Appellant before the District Court, the main grievance was that the burden of proving that Tukaram expired in the year 1955 could not have been put on the Appellant-Defendant No.1 and Issue No.1 should have been framed calling upon the Respondent No.1 to prove that Tukaram died in or about 1960 i.e. after coming into force the said Act of 1956. According to the Appellant the principle grave error was committed by the Trial Court by putting burden of proof on the Appellant and it was for the Respondent No.1 to prove that Tukaram was alive till the year 1960. The Appellate Court negated the said contention. Hence the Appeal was dismissed.

6. Shri Thorat, learned Counsel appearing for the Appellant submitted that the Respondent had come to the Court with a case that Tukaram was alive in the year 1955 and a specific case was made out that he died in or about 1960. He placed reliance on Section 101 of Indian Evidence Act and submitted that burden of proving the said fact was on the Respondent No.1 and Issue No.1 was not properly framed by the learned Trial Judge. He submitted that as the Plaintiff-Respondent

No.1 has herself not discharged the burden on her, the suit should have been dismissed.

7. Shri Vaidya, learned Counsel appearing for the Respondents submitted that both the parties have led evidence. He pointed out various findings recorded by the Appellate Court. He also relied upon the Judgment of the Apex Court reported in A.I.R. 1991 S.C. page No.1040 (Raghunathi V. Raju Ramappa Shetty). He submitted that no interference was required in the Second Appeal under Section 100 of the Code of Civil Procedure, 1908.

8. I have considered the rival submissions. The Appellate Court has noted that after issues were framed by the trial Court on 4th September 1979, the suit was taken up for hearing on 16th July 1981 and for a period of two years the Appellant did not make any grievance about failure to frame the issues properly. Apart from this fact in the case of Raghunathi (supra) the Apex Court held as under :

"3...In so far as the second ground is concerned it is again settled law that once the parties have been permitted to produce evidence in support of their respective cases and it is not their grievance that any evidence was shut out the question of burden of proof loses significance and remains only academic..."

9. It is not in dispute that both the parties were

permitted to lead the evidence. Both the parties have led the evidence. After appreciating the entire oral and

documentary evidence on record the Courts below have accepted

the case of the Respondent No.1.

10. The Appellate Court noted that vide mutation entry No.6381 the name of the Appellant was entered in the Revenue record. Tukaram was the manager of the joint family and after his demise the name of the Appellant was allegedly mutated in the Revenue record. The said mutation entry which could have shown the date of death of Tukaram was not produced by the Appellant. The Appellate Court has referred to the fact that prior to institution of the suit, suit notice was issued by the Respondent No.1 in which all facts were asserted and assertions made in the said notice were not disputed by sending reply. Considering all these aspects, the Courts below have accepted the case of the Respondent No.1 and have passed a decree for partition. The findings which are recorded are based on appreciation of oral and documentary evidence on record. I find that the said findings are not perverse. Even assuming that another view is possible to be taken on the basis of evidence on record is no ground to interfere in a Second Appeal under Section 100 of Code of Civil Procedure, 1908.

11. There is no merit in the Second Appeal and the same is dismissed with no order as to costs.

Judge.